

STATE OF MONTANA

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 5-83:

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO,

Petitioner,

CITY OF WHITEFISH,

Employer.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDED ORDER.

* * * * *

On September 26, 1983, this Board received the above-captioned Petition for Unit Clarification asking for a determination of whether one Street and Sanitation Superintendent position should be included in the unit of Whitefish city employees represented by Petitioner.

On October 4, 1983, this Board received the Employer's Answer arguing for exclusion of the position from the bargaining unit.

The hearing was conducted November 14, 1983, in Whitefish, Montana, under the authority of Title 39, Chapter 31, MCA and ARM 24.26. 630(5) and in accordance with the Administrative Procedure Act, Title 2, Chapter 4, MCA. Kathryn Walker was the hearing examiner. George Hagerman, field representative for Montana Council No. 9, American Federation of State, County and Municipal Employees, AFL-CIO, represented Petitioner. Don Morrison, Whitefish City Administrator, represented the Employer.

FINDINGS OF FACT

Having carefully reviewed the record in this matter, including sworn testimony and evidence, the hearing examiner makes the following findings of fact:

1./ The American Federation of State, County and Municipal Employees, AFL-CIO, Petitioner in this matter, is the exclusive representative of certain employees of the City of Whitefish, Montana.

2./ At all times relevant to this matter, Petitioner and Employer

1 were signatory to a collective bargaining agreement which contained the
2 following clause:

3 ARTICLE I - RECOGNITION

4 The Employer recognizes the Union as the bargaining agent for
5 all employees of the City's Street and Sanitation Division and
6 Water/Wastewater Division, excepting and excluding: Clerk of
7 the Water/Wastewater Division, Water/Wastewater Division Man-
8 ager, Street/Sanitation Division Manager, Supervisors as de-
9 fined by the Act, and all other employees. [Emphasis added.]

10 Addendum A, the Wage Schedule, listed the titles of employees
11 covered by that agreement. Those titles were:

12	Public Works	Mechanic
13	Department:	
14	Street and	Leadman (Route Supervisor)
15	Sanitation	Crewman (Refuse Collector/Truck Driver)
16	Division:	Senior Equipment Operator (Equipment Operator III)
17		Heavy Equipment Operator (Equipment Operator II)
18		Motor Grader Operator (Equipment Operator II)
19		Truck Driver-Laborer (Equipment Operator I)
20	Water and	Senior Water Operator (Water/Wastewater Operator II)
21	Wastewater	Senior Wastewater Operator (Water/Wastewater Operator
22	Division:	II)
23		Backhoe - Loader (Equipment Operator II)
24		Utilityman (Water/Wastewater Operator I)

25 3./ The Employer listed March 19, 1982, as the application deadline
26 on a position announcement for a Street and Sanitation Division Manager.
27 That announcement provided the following information:

28 Salary
29 To \$1,941 per month plus benefits.

30 Examples of Duties

31 Under general supervision of the Public Works Director, the Street
32 and Sanitation Division Manager exercises general and close super-
vision over street and solid waste operations. Duties include
planning, organizing and coordinating daily tasks; training, super-
vising and evaluating division employees; providing necessary
supervision and inspection at project sites; calculating quantities
of materials for construction and maintenance costs; analyzing
division operations; preparing and executing division budgets and
plans; preparing special reports; maintaining purchasing and inven-
tory control operations; performing general maintenance of equipment;
operating loaders, trucks, pavers, sanders and other equipment as
needed; performing other related duties.

33 Minimum Qualifications

34 Education and Experience:

- 35 1. Graduation from standard high school or GED equivalent, and
- 36 2. Five years of increasingly responsible experience in street
37 construction and maintenance, two of which should have been

- at a supervisory level, and
3. One year of experience in solid waste collection operations, or
4. An equivalent combination of education and experience.

Necessary Knowledge, Skills, and Abilities:

1. Considerable knowledge of street construction and maintenance including standard specifications for paving, culverts, storm sewers, aggregates, etc.; considerable knowledge of principles of management; knowledge of solid waste collection operations; working knowledge of general maintenance and repair of heavy equipment, and
2. Ability to calculate and cost quantities of asphalt, earthwork, etc.; ability to plan, organize and analyze department operations; ability to establish effective working relationships with supervisors, employees and the public; ability to train, direct, motivate and evaluate employees.

4./ The Employer actively recruited for the Street and Sanitation Division Manager position, received applications, interviewed applicants, and offered the position to several applicants. However, the Employer was unable to find a qualified applicant willing to accept the job.

5./ The Employer appointed George Wartnow as Acting Foreman of the Street and Alley Department effective April 11, 1983, until it filled the permanent position.

6./ The Employer listed July 20, 1983, as the application deadline on a position announcement for a Street and Sanitation Superintendent.

That announcement cited the following information:

Salary

Depending on Qualifications up to \$8.50/hour plus benefits.

Examples of Duties

Under general supervision of the Public Works Director, the Street and Sanitation Superintendent exercises general and close supervision over street and solid waste operations. Duties include planning, organizing and coordinating daily tasks; training, supervising and evaluating division employees; providing necessary supervision and inspection at project sites; calculating quantities of materials for construction and maintenance projects; analyzing division operations; preparing and executing division budgets and plans; preparing special reports; maintaining purchasing and inventory control operations; performing general maintenance of equipment; operating loaders, trucks, pavers, sanders and other equipment as needed; performing other related duties.

Minimum Qualifications

Education and Experience:

1. Graduation from standard high school or GED equivalent, and
2. Two years increasingly responsible experience in street and sanitation work, and
3. Three years experience in a local government supervisory position, or

4. An equivalent combination of education and experience.

Necessary Knowledge, Skills, and Abilities:

1. Considerable knowledge of street construction and maintenance including standard specifications for paving, culverts, storm sewers, aggregates, etc.; considerable knowledge of principles of management; knowledge of solid waste collection operations; working knowledge of general maintenance and repair of heavy equipment, and
2. Ability to calculate and cost quantities of asphalt, earthwork, etc.; ability to plan, organize and analyze department operations; ability to establish effective working relationships with supervisors, employees and the public; ability to train, direct, motivate and evaluate employees.

7./ George Wartnow, the Acting Foreman of the Street and Alley

Department, was hired as the Street and Sanitation Superintendent effective August 15, 1983.

8./ The job description for "Street and Sanitation Division Manager, AKA Street and Sanitation Superintendent" in the Employer's Public Works Department, Streets and Sanitation Division, effective July 1983, stated:

General Purpose

Performs a variety of supervisory and skilled tasks in the development and maintenance of Whitefish City street and sanitation systems.

Supervision Received

Works under the general guidance and direction of the Public Works Director.

Supervision Exercised

Exercises general and close supervision over Street and Sanitation division personnel who perform unskilled, semi-skilled, and skilled work in the development and maintenance of City street and sanitation systems.

Examples of Duties

Under general supervision of the Public Works Director, the Street and Sanitation Superintendent exercises general and close supervision over street and solid waste operations. Duties include planning, organizing and coordinating daily tasks; training, supervising and evaluating division employees; providing necessary supervision and inspection at project sites; calculating quantities of materials for construction and maintenance projects; analyzing division operations; preparing and executing division budgets and plans; preparing special reports; maintaining purchasing and inventory control operations; performing general maintenance of equipment; operating loaders, trucks, pavers, sanders and other equipment as needed; performing other related duties.

Minimum Qualifications

Education and Experience:

1. Graduation from standard high school or GED equivalent, and
2. Two years increasingly responsible experience in street and sanitation work, and
3. Three years experience in a local government supervisory position, or

1 4. An equivalent combination of education and experience.

2 Necessary Knowledge, Skills, and Abilities

- 3 1. Considerable knowledge of street construction and maintenance
4 including standard specifications for paving, culverts, storm
5 sewers, aggregates, etc.; considerable knowledge of principles
6 of management; knowledge of solid waste collection operations;
7 working knowledge of general maintenance and repair of heavy
8 equipment, and
9 2. Ability to calculate and cost quantities of asphalt, earthwork,
10 etc.; ability to plan, organize and analyze department opera-
11 tions; ability to establish effective working relationships
12 with supervisors, employees and the public; ability to train,
13 direct, motivate and evaluate employees.

14 Special Requirements

15 A valid Montana Chauffeur's License, or ability to obtain one.

16 Selection Guidelines

17 Review of previous experience; examination of previous performance
18 record; interview with hiring authority.

19 9./ After Mr. Wartnow became Street and Sanitation Superintendent, he
20 and the Public Works Director interviewed and recommended the hiring of a
21 mechanic. Mr. Wartnow and the Public Works Director worked together to
22 fill this position because the incumbent was to be under Mr. Wartnow's
23 jurisdiction when working on Street and Sanitation Division equipment.

24 As part of his regular duties as Street and Sanitation Superintendent,
25 Mr. Wartnow assigned and directed the work of the Street and Sanitation
26 Division's ten employees. He also scheduled employees' work, vacations,
27 and use of equipment; trained equipment operators; and "transferred" em-
28 ployees within the division (e.g., from Sanitation to Streets to Parks).

29 Since becoming Street and Sanitation Superintendent, Mr. Wartnow had
30 orally reprimanded two employees in the division. This involved talking
31 to them and meeting with them and the Public Works Director.

32 As Street and Sanitation Superintendent, Mr. Wartnow had access to
the personnel files of all employees in the division.

The record indicated that Mr. Wartnow, as Street and Sanitation Super-
intendent, would be doing/providing primary input for the performance
evaluations of the division's employees (these evaluations were done once
a year in January, so Mr. Wartnow had not yet had occasion to do them),
serving on the management negotiating team (there had been no negotiations

1 since Mr. Wartnow had assumed the Superintendent position), and doing
2 staff studies to determine the need for and extent of any reductions
3 in force.

4 The record indicated that Mr. Wartnow would be involved in pro-
5 cessing any grievances filed in the Street and Sanitation Division;
6 however, none had been filed during his tenure as Street and Sanita-
7 tion Superintendent.

8 Mr. Wartnow had not promoted, discharged, or rewarded anyone since
9 becoming Street and Sanitation Superintendent. The record did not ad-
10 dress his authority to take these actions or to suspend or recall employees.

11 10./ Mr. Wartnow had earned \$8.50 per hour since becoming Street and
12 Sanitation Superintendent. At the time of the hearing, hourly wages of
13 bargaining unit members were \$8.03, \$7.91, \$7.86, \$7.82, and \$7.67.

14 11./ As Street and Sanitation Superintendent, Mr. Wartnow's holidays
15 were determined by the City of Whitefish's personnel plan, not the union
16 contract; he earned compensatory time, not overtime (which the bargaining
17 unit members earned); and he was allowed to schedule his own vacation,
18 lunch hour, and break time, unlike those covered by the union contract.

19 12./ Since becoming Street and Sanitation Superintendent, Mr. Wartnow
20 had attended regular management meetings with the City Administrator, the
21 Public Works Director, and the Water and Wastewater Division Manager.

22 13./ Mr. Wartnow's responsibilities as Street and Sanitation Super-
23 intendent also included doing surveys, evaluations, and inspections;
24 monitoring contractors; participating in budget meetings and administering
25 the division's budget; approving/seeking approval of expenditures (depend-
26 ing on item and cost); purchasing equipment and supplies; processing
27 citizen complaints; doing manual labor when training, augmenting short-
28 handed crews, and in emergencies.

29 DISCUSSION

30 To determine whether the Street and Sanitation Superintendent should
31 be included in the bargaining unit represented by Petitioner, the hearing
32 examiner addressed the following questions:

1 I. Was the Street and Sanitation Superintendent position the same as
2 the Street and Sanitation Division Manager position, a position
3 specifically excluded from the unit by the parties' collective
4 bargaining agreement? If so, was the Street and Sanitation Super-
5 intendent position, which had replaced the Street and Sanitation
6 Division Manager position, excluded from the unit?

7 The hearing examiner concluded that the two positions were the same
8 in the respects relevant to this matter because the examples of duties
9 statements on their position announcements and the job description
10 were identical save reference to position title. In making this deter-
11 mination, she noted that a position's duties, not its title, salary,
12 or minimum qualifications, are determinative of its eligibility for
13 bargaining unit status. Furthermore, the hearing examiner found that
14 the duties actually performed by Mr. Wartnow, the incumbent Street and
15 Sanitation Superintendent, were aptly described by the position announce-
16 ment and job description.

17 The hearing examiner then determined that the Street and Sanitation
18 Superintendent position was excluded from the bargaining unit by the
19 parties' collective bargaining agreement. It is this Board's practice
20 to defer to parties' labor contracts and well established law that
21 parties may negotiate the composition of their bargaining unit.¹ The
22 hearing examiner assumed the parties had agreed to exclude the Street
23 and Sanitation Division Manager position because of its responsibilities
24 and duties. If followed that the Street and Sanitation Superintendent
25 position, which had replaced the Street and Sanitation Division Manager
26 position and was responsible for the same function, would be excluded
27 from the bargaining unit by that labor agreement.

28 II. Was the Street and Sanitation Superintendent position supervisory
29 in nature and therefore excluded from the bargaining unit by
30

31 ¹ The Developing Labor Law, ed. by Charles J. Morris (2d ed.;
32 Washington D.C.: Bureau of National Affairs, 1983) I, 848-849.

1 section 39-31-103 MCA?

2 Having found that the Street and Sanitation Superintendent position
3 was excluded from the unit by the parties' collective bargaining agree-
4 ment, it was somewhat superfluous for the hearing examiner to address
5 this question. However, she did find that the position met the statutory
6 criteria for exclusion from the unit.

7 Section 39-31-103(2)(b)(iii) MCA excludes supervisory employees
8 from coverage of Montana's Collective Bargaining Act for Public Employees.
9 Section 39-31-103(3) MCA defines "supervisory employee" as:

10 . . . any individual having authority in the interest of the employer
11 to hire, transfer, suspend, lay off, recall, promote, discharge, as-
12 sign, reward, discipline other employees, having responsibility to
13 direct them, to adjust their grievances, or effectively to recommend
such action, if in connection with the foregoing the exercise of such
authority is not of a merely routine or clerical nature but requires
the use of independent judgment.

14 The record established that Mr. Wartnow, the Street and Sanitation
15 Superintendent, had been involved in hiring for a position in the bargaining
16 unit, had assigned and directed the work of ten employees in the bargaining
17 unit on a daily basis, had disciplined employees in the bargaining unit, and
18 and, if the situation arose, would be involved in adjusting the grievances
19 of employees in the bargaining unit. It further indicated he had access
20 to the personnel files of all bargaining unit employees in his division,
21 was responsible for training these employees, would do these employees'
22 performance evaluations when the time came, and would serve on management's
23 negotiating committee when negotiations with Petitioner commenced. Other
24 indicia of Mr. Wartnow's supervisory status were that he participated in
25 meetings attended only by managers/administrators/supervisors, was paid
26 at a considerably higher rate than members of the bargaining unit, and
27 worked under the Employer's personnel plan rather than the terms of the
28 bargaining unit's contract.

29 CONCLUSIONS OF LAW

30 The Street and Sanitation Superintendent position in the City of
31 Whitefish is excluded from the bargaining unit represented by Petitioner
32

1 by the parties' collective bargaining agreement, which is valid and
2 enforceable under section 39-31-306(3) MCA.

3 The Street and Sanitation Superintendent position in the City
4 of Whitefish is supervisory as that term is defined by section 39-
5 31-103(3) MCA.

6 RECOMMENDED ORDER

7 The Street and Sanitation Superintendent position in the City
8 of Whitefish is not included in the bargaining unit of City of White-
9 fish employees represented by Petitioner.

10
11 DATED this 19th day of June, 1984.

12
13 BOARD OF PERSONNEL APPEALS

14
15 By Kathryn Walker
16 Kathryn Walker
Hearing Examiner

17
18 NOTICE

19 Written exceptions may be filed to these Findings of Fact, Conclu-
20 sions of Law, and Recommended Order within twenty days service thereof.
21 If no exceptions are filed with the Board of Personnel Appeals within
22 that period of time, the Recommended Order shall become the Final Order.
23 Exceptions shall be addressed to the Board of Personnel Appeals,
24 Capitol Station, Helena, Montana 59620.

25
26 CERTIFICATE OF MAILING

27 I, Kathryn Walker, certify that on the 19th day of June,
28 1984, I mailed a true and correct copy of the above Findings of Fact,
Conclusions of Law, and Recommended Order to the following:

29 Mr. George Hagerman
30 Field Representative
Montana Council No. 9
AFSCME, AFL-CIO
31 600 North Cooke
Helena, MT 59601

Mr. Don A. Morrison
City Administrator
City of Whitefish
Box 158
Whitefish, MT 59937